

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

On November 28, 2005, the Court heard Plaintiff OptiStreams, Inc.'s ("OptiStreams") Motion to Dismiss Sean Gahan's Fourth Claim for Relief Pursuant to Rule 12(b) (6) (the "Motion"). Upon due consideration of the written and oral arguments of the parties and the record herein, the Court GRANTS the Motion and GRANTS Mr. Gahan's request for leave to amend.

I. Factual Background

Defendant and Counter-Claimant Sean Gahan worked as a computer programmer for Plaintiff and Counter-Defendant

1 OptiStreams, Inc., from August 2002 through September 30, 2004.
2 OptiStreams alleges that, on or about July 15, 2004, Mr. Gahan
3 accessed OptiStreams' computer network and electronic database to
4 tamper with data it contained and caused harm to electronic
5 storage files. OptiStreams also alleges that, in or around
6 August 2004, Plaintiff falsely told a third party that
7 OptiStreams was insolvent and could not pay its bills.
8 On August 30, 2004, Mr. Gahan gave OptiStreams notice that he was
9 resigning effective September 30, 2004.

10 Before Mr. Gahan's employment ended, OptiStreams asked him
11 to sign a declaration. Mr. Gahan claims that the declaration
12 contained false and misleading statements.

13 Mr. Gahan claims that, on or around October 18, 2004, and on
14 other occasions, agents of OptiStreams told third parties that
15 Mr. Gahan had wrongfully engaged in computer hacking, that a
16 criminal investigation had implicated Mr. Gahan, and that Mr.
17 Gahan had failed to sign a truthful declaration arising from the
18 incident. Mr. Gahan alleges that Steve Genuser, an OptiStreams
19 employee, made statements about him in a memorandum of October
20 18, 2004. 1st Am. Countercl. Ex. C. Mr. Gahan alleges that
21 these claims were false and injured his reputation.

22 **II. Procedural History**

23 On December 22, 2004, OptiStreams sued Mr. Gahan in the
24 Superior Court of California in Fresno. OptiStreams alleged
25 causes of action for slander, breach of fiduciary duty/duty of
26 loyalty, trespass to chattels, computer tampering, and

1 conversion. On January 24, 2005, Mr. Gahan removed the action to
2 this Court and filed a counterclaim for damages. The
3 counterclaim featured the following causes of action: waiting
4 time penalties under California Labor Code section 203, penalties
5 for failure to provide COBRA notice under 29 U.S.C. section 1132,
6 defamation, and retaliation/abuse of process. Mr. Gahan filed an
7 amended counterclaim on August 26, 2005.

8 On October 19, 2005, OptiStreams filed this motion. On
9 November 9, 2005, Mr. Gahan filed his opposition along with an
10 excerpt from the deposition of Jon Haugan, the CEO of
11 OptiStreams.

12 **III. Discussion**

13 **A. Legal Standard**

14 Dismissal of a complaint pursuant to Rule 12(b)(6) is proper
15 if "it appears beyond doubt that the plaintiff can prove no set
16 of facts in support of his claim which would entitle him to
17 relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2
18 L. Ed. 2d 80 (1957). In testing the sufficiency of a complaint
19 against a Rule 12(b)(6) challenge, a court must "accept all
20 material allegations in the complaint as true and construe them
21 in the light most favorable to the plaintiff." North Star Int'l
22 v. Arizona Corp. Comm'n, 720 F.2d 578, 580 (9th Cir. 1983). The
23 Court need not, however, "accept legal conclusions cast in the
24 form of factual allegations if those conclusions cannot
25 reasonably be drawn from the facts alleged." Clegg v. Cult
26 Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994).

1 A complaint may be dismissed as a matter of law if there is
2 a lack of a cognizable legal theory or if there are insufficient
3 facts alleged under a cognizable legal theory. Balistreri v.
4 Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). The
5 Court must determine whether or not it appears to a certainty
6 under existing law that no relief can be granted under any set of
7 facts that might be proved in support of a plaintiff's claims.
8 De La Crux v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978), *cert.*
9 *denied*, 441 U.S. 965, 99 S. Ct. 2416, 60 L. Ed. 2d 1072 (1979).
10 Where the complaint fails to state a claim on which relief can be
11 granted, leave to amend "shall be freely given when justice so
12 requires." Fed. R. Civ. P. 15(a); Allen v. Beverly Hills, 911
13 F.2d 367, 373 (9th Cir. 1990).

14 **B. Abuse of Process¹**

15 California courts define the tort of abuse of process as
16 follows:

17 The tort of abuse of process has two
18 elements: there must be wrongful use of
19 process, not merely a request for or
20 initiation of process – and second, the act
21 complained of must involve the use of
22 process. Process is action taken pursuant to
23 judicial authority. It is not action taken
24 without reference to the power of the court.
Thus, serving upon plaintiff a false notice
that a bench warrant had been issued is not
process, because in making the false
statement defendant took no action pursuant
to court authority. Merely obtaining or
seeking process is not enough; there must be
subsequent abuse, by a misuse of the judicial

25 ¹Mr. Gahan's Fourth Claim for Relief in actuality encompasses
26 two types of claims: abuse of process and retaliation.

1 process for a purpose other than that which
2 it was intended to serve.

3 Adams v. Super. Ct., 2 Cal. App. 4th 521, 530 (1992) (internal
4 citations omitted).

5 **1. Deposition Testimony**

6 OptiStreams' only argument against Mr. Gahan's abuse of
7 process claim is that it improperly relies upon privileged
8 evidence. Mr. Gahan supports his abuse of process claim with the
9 allegation that: "In his deposition taken on June 27, 2005 Jon
10 Haugan testified that one of the reasons that Gahan was sued was
11 because he refused to sign the declaration."² Compl. at 5.

12 OptiStreams claims the deposition testimony is privileged
13 under California Civil Code section 47(b), which states:

14 A privileged publication or broadcast is one
15 made:
16 . . .

17 (b) In any (1) legislative proceeding,
18 (2) judicial proceeding, (3) in any other
19 official proceeding authorized by law, or (4)
20 in the initiation or course of any other
21 proceeding authorized by law and reviewable
22 pursuant to Chapter 2 (commencing with
23 Section 1084) of Title 1 of Part 3 of the
24 Code of Civil Procedure,

25 ²Mr. Gahan points to the following deposition testimony:

26 Q: Have you ever told anyone that the
27 lawsuit was file [sic] because Mr. Gahan
28 would not sign the declaration?

A: No.

Q: Was that a factor in the decision to file
the lawsuit?

A: I'm sure it was a factor, but it was just
one of many.

26 Sagaser Decl. Ex. A.

1 with certain exceptions that are inapplicable here. Cal. Civ.
2 Code § 47. A deposition is a "judicial proceeding" within the
3 meaning of section 47(b). Sipple v. Found. for Nat'l Progress,
4 71 Cal. App. 4th 226, 243 (1999).

5 Contrary to OptiStreams' contention, section 47 does not
6 function as an evidentiary privilege. Oren Royal Oaks Venture v.
7 Greenberg, Bernhard, Weiss & Karma, Inc., 42 Cal. 3d 1157, 1168
8 (Cal. 1986). Rather, "[t]he privileges of Civil Code section 47,
9 unlike evidentiary privileges which function by the exclusion of
10 evidence (see Evid. Code, § 900 et seq.), operate as limitations
11 upon liability." Id. In actuality, section 47 merely bars
12 certain tort claims predicated on conduct in judicial
13 proceedings. Id. It does not exclude statements made in
14 judicial proceedings that go to the speaker's intent "when
15 allegations of misconduct properly put an individual's intent at
16 issue in a civil action." Id.

17 To prove his abuse of process claim, Mr. Gahan must show
18 that OptiStreams acted with an improper purpose. Mr. Haugan's
19 deposition testimony tends to show that OptiStreams filed the
20 lawsuit, at least in part, as a reaction to certain conduct of
21 Mr. Gahan, rather than to obtain recovery on the merits. Because
22 it does not appear as if Mr. Gahan is claiming that Mr. Haugan's
23 deposition testimony itself was tortious, the Court need not
24 decide whether section 47 bars such a claim.

25 **2. Improper Litigation Conduct**

26 An abuse of process claim requires that OptiStreams did

1 something more than simply file and maintain a lawsuit with an
2 improper purpose. Oren Royal Oaks, 42 Cal. 3d at 1169. Rather,
3 Mr. Gahan must allege, in addition to the filing with an improper
4 purpose, "a wilful act . . . not proper in the regular conduct of
5 the proceeding." Id. at 1168-69; see, e.g., Trear v. Sills, 69
6 Cal. App. 4th 1341, 1359 (1999) (plaintiff failed to state a
7 claim for abuse of process because he did not allege an improper
8 use of process other than filing the suit).

9 This requirement distinguishes the tort from a malicious
10 prosecution claim and properly balances "the freedom of an
11 individual to seek redress in the courts and the interest of a
12 potential defendant in being free from unjustified litigation."
13 Id. at 1169. Redress based on merely initiating and maintaining
14 a suit for an improper purpose is limited to the common law tort
15 of malicious prosecution, which requires "'that the prior action
16 (1) was commenced by or at the direction of the defendant and was
17 pursued to a legal termination in his . . . favor . . .; (2) was
18 brought without probable cause . . .; and (3) was initiated with
19 malice'" Id. (quoting Bertero v. Nat'l Gen. Corp., 13
20 Cal.3d 43, 50 (1974)). Allowing an abuse of process tort to
21 proceed merely on the basis of an improper filing and maintenance
22 of a lawsuit would effectively negate the probable-cause
23 requirement of an action for malicious prosecution. Id. at 1169-
24 70.

25 Mr. Gahan's complaint does not claim that OptiStreams has
26 prosecuted the lawsuit in an abusive manner. Rather, he only

1 claims that "Gahan was sued" for an improper purpose (Compl. at
2 5), that OptiStreams' "filing of the lawsuit" constitutes an
3 abuse of process (id. at 6), and that "the retaliatory
4 institution of the present legal action" harmed him (id.). These
5 claims are insufficient as a matter of law to support a claim for
6 abuse of process. The Court holds that Mr. Gahan has not stated
7 a claim for abuse of process.

8 **C. Retaliation**

9 Mr. Gahan claims that he is entitled to recover for
10 retaliation on two bases: (1) under California Labor Code
11 sections 98.6 and 1102.5 and (2) for what he calls "retaliation
12 in violation of public policy" (Opp'n at 4) under Tameny v.
13 Atlantic Richfield Co. (Tameny) 27 Cal. 3d 167 (1980).
14 OptiStreams claims that dismissal of the retaliation claim is
15 proper because none of these authorities recognize a claim by a
16 former employee based on conduct by an employer following
17 voluntary resignation. In response, Mr. Gahan cites no case law
18 that supports a retaliation claim under such a theory.

19 **1. California Labor Code sections 98.6 and 1102.5**

20 Under California Labor Code section 98.6(a),³ an employer

21 ³California Labor Code sections 98.6(a) provides, in full:
22

23 No person shall discharge an employee or in
24 any manner discriminate against any employee
25 or applicant for employment because the
26 employee or applicant engaged in any conduct
delineated in this chapter, including the
conduct described in subdivision (k) of
Section 96, and Chapter 5 (commencing with
Section 1101) of Part 3 of Division 2, or

1 may not "discharge an employee or in any manner discriminate
2 against any employee or applicant for employment" on the basis
3 that the employee or applicant engaged in certain protected
4 activities. As a remedy for such a violation "any employee who
5 is discharged, threatened with discharge, demoted, suspended, or
6 in any other manner discriminated against in the terms and
7 conditions of his or her employment" is entitled to
8 "reinstatement and reimbursement for lost wages and work benefits
9 caused by such acts of the employer." Cal. Labor Code §
10 98.6(b).⁴ Mr. Gahan claims that his refusal to sign the

11 because the employee or applicant for
12 employment has filed a bona fide complaint or
13 claim or instituted or caused to be instituted
14 any proceeding under or relating to his or her
15 rights, which are under the jurisdiction of
16 the Labor Commissioner, or because the
17 employee has initiated any action or notice
pursuant to Section 2699, or has testified or
is about to testify in any such proceeding or
because of the exercise by the employee or
applicant for employment on behalf of himself,
herself, or others of any rights afforded him
or her.

18 ⁴Section 98.6(b) provides, in full:

19 Any employee who is discharged, threatened
20 with discharge, demoted, suspended, or in any
21 other manner discriminated against in the
22 terms and conditions of his or her employment
23 because the employee engaged in any conduct
24 delineated in this chapter, including the
25 conduct described in subdivision (k) of
26 Section 96, and Chapter 5 (commencing with
Section 1101) of Part 3 of Division 2, or
because the employee has made a bona fide
complaint or claim to the division pursuant to
this part, or because the employee has
initiated any action or notice pursuant to
Section 2699 shall be entitled to

1 declaration at OptiStreams' request is qualifying conduct
2 protected under Labor Code section 1102.5.⁵ "To establish a
3 *prima facie* case for retaliation under Section 1102.5, an
4 employee must show (1) that he engaged in protected activity, (2)
5 that he was thereafter subjected to an adverse employment action
6 by his employer, and (3) that there was a causal link between the
7 protected activity and the adverse employment action." Love v.
8 Motion Indus., 309 F. Supp. 2d 1128, 1134 (N.D. Cal. 2004)
9 (citing Morgan v. Regents of Univ. of Cal., 88 Cal. App. 4th 52,

10 reinstatement and reimbursement for lost wages
11 and work benefits caused by such acts of the
12 employer. Any employer who willfully refuses
13 to hire, promote, or otherwise restore an
14 employee or former employee who has been
determined to be eligible for such rehiring or
promotion by a grievance procedure,
arbitration, or hearing authorized by law, is
guilty of a misdemeanor.

15 ⁵Section 1102.5 provides, in relevant part:

16 (b) An employer may not retaliate against
17 an employee for disclosing information to a
18 government or law enforcement agency, where
19 the employee has reasonable cause to believe
20 that the information discloses a violation of
state or federal statute, or a violation or
noncompliance with a state or federal rule or
regulation.

21 (c) An employer may not retaliate against
22 an employee for refusing to participate in an
activity that would result in a violation of
23 state or federal statute, or a violation or
noncompliance with a state or federal rule or
regulation.

24 (d) An employer may not retaliate against
25 an employee for having exercised his or her
26 rights under subdivision (a), (b), or (c) in
any former employment.

1 69 (2000)).

2 Mr. Gahan cannot meet the second requirement for a prima
3 facie case for retaliation because he does not allege that he
4 faced an "adverse employment action." The requirement of an
5 adverse employment action is supported by the text of section
6 98.6(b). Under that section, a claim only arises where the
7 employee is "discharged, threatened with discharge, demoted,
8 suspended, or in any other manner discriminated against ***in the***
9 ***terms and conditions of his or her employment.***" Cal. Labor Code
10 98.6(b) (emphasis added). Furthermore, sections 98.6 and 1102.5
11 apply by their terms only to actions that employers take against
12 "employees" or "applicants," not former employees. See Cal.
13 Labor Code § 98.6(b) ("No person shall . . . in any manner
14 discriminate against any employee or applicant for employment");
15 Cal. Labor Code § 1102.5 ("employer may not retaliate against an
16 employee").

17 Mr. Gahan claims that language in section 1102.5 expressly
18 forbids such retaliation against former employees. Mr. Gahan
19 apparently is referring to the language of section 1102.5(d):
20 "An employer may not retaliate against an employee for having
21 exercised his or her rights under subdivision (a), (b), or (c) in
22 any former employment." The Court does not read this language as
23 authorizing a claim for an adverse action outside of the
24 employment relationship. By its plain language it authorizes a
25 suit by an employee against a present employer only. The "former
26 employment" language authorizes a suit where the present employer

1 retaliates against the employee because of something that the
2 employee did in a former job. The statute uses the modifier
3 "former" to indicate when the employee's protected act occurred.
4 However, in indicating who may sue for the retaliation, that is,
5 "an employee," no similar modifier is used. The statute could
6 have easily authorized a claim like Mr. Gahan's by extending the
7 cause of action to prohibit retaliation against a "**former**
8 employee." The statute contains no such language. Consequently,
9 section 1102.5(d) does not create a cause of action by former
10 employees who face adverse action after resigning.

11 Furthermore, Mr. Gahan's reading of section 1102.5(d) would
12 render it inconsistent with the language in section 98.6 that
13 limits relief to discrimination "in the terms and conditions" of
14 employment. "[S]tatutes should be interpreted in such a way as
15 to make them consistent with each other, rather than obviate one
16 another." K & K Services, Inc. v. Irwindale, 47 Cal. App. 4th
17 818, 826 (1996) (quoting Nickelsberg v. Workers' Comp. Appeals
18 Bd., 54 Cal. 3d 288, 298 (1991)). Section 98.6(b) provides
19 relief in certain cases where an employee's conduct meets certain
20 statutory requirements, such as those specified in 1102.5. The
21 Court does not read the language in the statute that defines the
22 protected conduct of the employee, section 1102.5, to rewrite the
23 statute defining the class of individuals who may obtain relief
24 under a private right of action, section 98.6(b).⁶

25
26 ⁶At oral argument, OptiStreams urged the Court to consider in support of its interpretation the definition of "employee" that

1 It is undisputed that Mr. Gahan voluntarily resigned from
2 his position at OptiStreams prior to the lawsuit. The only
3 conduct that Mr. Gahan points to in support of the retaliation
4 claim is OptiStreams' filing of the postemployment lawsuit. This
5 conduct did not affect the "terms and conditions" of Mr. Gahan's
6 employment: he had resigned voluntarily three months prior. Nor
7 did OptiStreams, even if the suit was in retaliation for
8 statutorily protected conduct of Mr. Gahan, a former employee,
9 retaliate against "an employee" by filing the suit. Accordingly,
10 Mr. Gahan has failed to state a claim for retaliation under
11 sections 98.6 and 1102.5.

12 **2. Tamony Claim**

13 Mr. Gahan claims that California courts recognize a claim
14 for "retaliation in violation of public policy" (Opp'n at 4)
15 under a line of cases beginning with Tamony, 27 Cal. 3d 167. In

16 appears in California Labor Code section 3351: "'Employee' means
17 every person in the service of an employer under any appointment or
18 contract of hire or apprenticeship, express or implied, oral or
written, whether lawfully or unlawfully employed," This
19 definition, however, applies only to Division 4 of the Labor Code,
entitled "Workers' Compensation and Insurance" and not to sections
20 98.6 or 1102.5. Cal. Labor Code § 3350. Nor does the Court find
instructive OptiStreams' reference to Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028 (2005). The Yanowitz court interpreted
21 California Government Code section 12940, a provision of the
California Fair Employment and Housing Act (FEHA), to determine the
22 meaning of "adverse employment action" in the context of a
retaliation action. Id. at 1050. Though the statute in that case
23 is similar to those on which Mr. Gahan bases his claim, the
analysis does not inform the Court's reading of Labor Code sections
24 98.6 and 1102.5. This is because the Yanowitz court reached its
holding by reading together of two different provisions of that
25 statute in light of the goals of the FEHA. Id. Consequently, that
analysis is unique to that statute and does not inform our
26 interpretation of the provisions here.

1 Tamony the Supreme Court of California held that an employee
2 could recover tort damages where the employer discharges the
3 employee in violation of public policy. Id. at 170.
4 Subsequently, the court expanded the relief created in Tamony to
5 protect employees who faced employment actions short of
6 termination. Garcia v. Rockwell Int'l Corp., 187 Cal. App. 3d
7 1556, 1562 (1986). Under Garcia, an employee who was not
8 terminated could recover "where disciplinary action has been
9 taken against the employee in retaliation for the employee's
10 'whistle-blowing' activities, even though the ultimate sanction
11 of discharge has not been imposed." Id.; see Scott v. Pac. Gas &

12 Elec. Co.

13 , 11 Cal. 4th 454, 465 (1995) ("an employee, who was not
14 discharged but was wrongfully disciplined by the employer in
15 retaliation for revealing the latter's illegal activity, may sue
16 in tort" (citing Garcia, 187 Cal. App. 3d at 1562)). California
17 courts have rejected attempts to expand Tamony claims to
18 encompass retaliatory actions outside of the employment
19 relationship. Harris v. Atl. Richfield Co., 14 Cal. App. 4th 70,
20 75 (1993); see, e.g., Abrahamson v. NME Hosp., Inc., 195 Cal.
21 App. 3d 1325, 1329-30 (1987) (not applicable to termination of
22 contract with independent contractor); Premier Wine & Spirits v.
23 E. & J. Gallo Winery, 846 F.2d 537, 540 (9th Cir. 1988) (winery-
distributor contract).

24 OptiStreams did not terminate Mr. Gahan. Nor does Mr. Gahan
25 allege that OptiStreams took any disciplinary action against him
26 while he was an employee. Mr. Gahan alleges that he refused to

1 participate in an illegal activity while employed by OptiStreams,
2 that he later voluntarily resigned, and that after resignation
3 OptiStreams filed a lawsuit against him to retaliate for his
4 earlier refusal. Mr. Gahan cites no authority that extends
5 Tamony claims to retaliatory actions that occur after the
6 employment relationship ends. Nor does any authority indicate
7 that an employer's retaliatory lawsuit could amount to a
8 "disciplinary action" that would support a Tamony claim absent
9 termination. See Garcia, 187 Cal. App. 3d at 1562.

10 Therefore, Mr. Gahan has failed to state a claim that
11 entitles him to relief for a retaliatory adverse employment
12 action under California Labor Code sections 98.6 and 1102.5 or
13 under Tamony.

14

15 **ACCORDINGLY:**

16 1. OptiStreams' Motion to Dismiss Sean Gahan's Fourth
17 Claim for Relief Pursuant to Rule 12(b) (6) is GRANTED.

18 2. Mr. Gahan shall file a second amended counterclaim
19 within 30 days of the issuance of this order. Failure
20 to comply will result in dismissal of the counterclaim.

21

22

23 IT IS SO ORDERED.

24 **Dated:** December 6, 2005
25 810ha4

/s/ Robert E. Coyle
26 UNITED STATES DISTRICT JUDGE